CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Larry J. Canuti concerning the Board of Registration for Professional Engineers and Land Surveyors' policy of requiring one year of Party Chief experience before qualifying for the land surveyor examination[1]	1990 OAL Determination No. 4 [Docket No. 89-010] February 14, 1990 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

Determination by:

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether the Board of Registration for Professional Engineers and Land Surveyors' policy of requiring one year of "Party Chief" experience before qualifying for the "second division" land surveyor examination is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that this policy is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

THE ISSUE PRESENTED[2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether or not the Board of Registration for Professional Engineers and Land Surveyors' ("Board") policy (as reflected in the Board's letters of denial to Requester Larry Canuti) requiring one year of "Party Chief" experience prior to qualifying for the "second division" land surveyor examination is a "regulation" required to be adopted pursuant to the Administrative Procedure Act.[4]

THE DECISION [5],[6],[7],[8],[9]

OAL finds that:

(1) rules issued by the Board are specifically required by the Business and Professions Code to be adopted pursuant to the Administrative Procedure Act ("APA");

(2) the Board's experience requirement is a "regulation" as defined in Government Code section 11342, subdivision (b);

(3) this regulatory policy is not exempt from the requirements of the APA; and, therefore,

(4) this policy violates Government Code section 11347.5, subdivision (a).

REASONS FOR DECISION

I. AGENCY; AUTHORITY; BACKGROUND

Agency

The Board of Registration for Professional Engineers and Land Surveyors ("Board") is under the jurisdiction of the Department of Consumer Affairs.[10]

In 1929, the Legislature created the State Board of Registration for Civil Engineers.[11] Through the next several decades, the Legislature renamed the Board and broadened its powers so that it oversaw not only civil engineers but other professional engineers as well. In 1983, the Board was given its current name, adding the words "and Land Surveyors" to the title.[12] As enumerated in the Professional Engineers Act,[13] the Board is responsible for the registration, certification, and oversight of professional engineers and land surveyors in California.

Land surveyors are governed by the "Professional Land Surveyors' Act," which is found in Business and Professions Code sections 8700 through 8806.

The Board's regulations are found in Title 16, California Code of Regulations ("CCR"), Chapter 5, sections 400 through 471.

Authority [14]

The Board has been granted general rulemaking authority by Business and Professions Code section 6716, which states in part:

> "The board may adopt rules and regulations consistent with law and necessary to govern its action. These rules and regulations shall be adopted in accordance with the provisions of the Administrative Procedure Act." [Emphasis added.]

Business and Professions Code section 8710 grants the Board specific authority to adopt regulations governing land surveyors. Section 8710 provides:

> "The State Board of Registration for Professional Engineers and Land Surveyors is vested with power to administer the provisions and requirements of this chapter, and may make and enforce rules and regulations which are reasonably necessary to carry out its provisions." [Emphasis added.]

Background

To facilitate understanding of the issues presented in this determination, we set forth the following facts.

The Professional Land Surveyors' Act ("Act")[15] governs the licensing of land surveyors in California. To become licensed as a Professional Land Surveyor, the Act requires licensure applicants to pass two examinations, which are referred to as the "first division" and "second division" examinations, unless specifically exempt by statute or regulation.

Business and Professions Code section 8741, in part, defines these divisions of examinations:

> "(a) The first division of the examination shall test the applicant's knowledge of fundamental surveying, mathematics, and basic science. The board may prescribe by regulation reasonable educational or experience requirements . . . .
>
> "The second division of the examination shall test the applicant's ability to apply his or her knowledge and experience and to assume responsible charge in professional practice of land surveying." [Emphasis added.]

This Determination focuses on the second division examination. Before an applicant can take the second division examination, Business and Professions Code section 8742 requires the applicant to possess specific educational qualifications and experience in land surveying.[16] Section 8742 provides that this educational and experience requirement can be satisfied in three ways, one of which is as follows:

> "Actual experience in land surveying for at least six years, including one year of responsible field training and one year of responsible office training; . . ."[17] [Emphasis added.]

An applicant for the second division examination must also comply with Board regulations, including section 424 of Title 16 of the CCR, which provides in part:

> "(d) An applicant for licensure as a land surveyor must fulfill the educational and experience requirements outlined in Section 8741 and 8742 of the Code performing two or more of the activities listed in Section 8726 (a)-(f). The experience requirements must be gained under the immediate direction and supervision of a person qualified to practice land surveying.

> "Applicants who have passed the land surveyor in training examination may be credited with two years land surveying experience toward the six years necessary for licensure."

It has been alleged that the Board is imposing a specific experience requirement upon applicants for the second division examination which is not specified in any statute or regulation. Larry Canuti ("Requester") submitted a Request for Determination, dated May 10, 1989, to OAL stating that the Board has a policy of requiring applicants for the second division examination to provide evidence that he/she has at least one year of experience as a "Party Chief."[18]94

The Request states in part:

> ". . . The Board of Registration is requiring <u>one year of Party Chief experience</u> for admission to the LS [Land Surveyor] exam but no such requirement, that I can find, is stipulated in the LS [Land Surveyor] Act or Board Rules. . . ." [Emphasis added.]

In its Response to the Request for Determination, the Board defines the term "party chief" as "a generic term used in the land surveying profession to identify an individual who is in charge or who directs the movement of the surveying party. . . . The term 'party chief' is recognized in the profession as an individual who is responsible for certain tasks when engaged in field work. . . ."

The Requester alleges the following facts in his Request. On or about October 1, 1988, the Requester submitted an "Application for License as a Land Surveyor" to the Board for admission to the second division examination. In a letter dated March 14, 1989, the Board stated that the Requester was ineligible for admission to this examination for the following reason[19]:

> "Your references do not support your claim of having at least one year of satisfactory field training. Such field training must usually be at the level of Party Chief."

The Requester appealed the Board's decision by requesting the Board to re-evaluate his application. After re-evaluating the Requester's application, the Board found that the Requester was still ineligible for the examination for the following reason[20]:

> "You did not sufficently (sic) verify your Party Chief time. At least 12 months of verifiable time is required."

Although regulation section 424 does not currently require applicants to have one year of experience as a Party Chief, this regulation did formerly (between 1963 and 1973) require such experience. In 1963, the Board amended section 424 to read, in part:

> "(b) An applicant for license as a land surveyor must fulfill the following experience requirements:
>
> "(1) The six years of actual experience shall include not less than one (1) year of actual experience in the field at a level of responsibility equivalent to that of Chief of Party. For the purpose of this rule, Chief of Party is defined as the subordinate of a licensed land surveyor or registered civil engineer who is responsible for direction and supervision of one or more survey crews actively engaged in the field applying the principles and techniques of land surveying."[21] [Emphasis added.]

In 1973, section 424 was amended[22] to, among other things, delete subsection (b) and add a new subsection (c) which described the Board's requirements for an application for license as a land surveyor. This amendment deleted the requirement that applicants for the second division examination possess one year of experience as a "Chief of Party."

Although the Board deleted the Party Chief requirement in 1973, it appears that the Board intends to adopt further rules and regulations concerning the experience necessary for an applicant to qualify for the second division examination, which may reinstate this requirement.

In the 1988 Rulemaking Calendar the Board described the subject of various rulemakings it intended to propose during 1988, and listed the statutes the proposed rulemaking would be implementing and interpreting.[23] The "subject" of one of the proposed rulemakings listed by the Board was,

> "Adopt regulations concerning qualifications and experience required for a land surveyors license."

In the Rulemaking Calendar, the Board also indicated that the statutes this particular rulemaking would be interpreting or implementing were Business and Professions Code sections 8740 through 8742.

In addition to the Rulemaking Calendar, the Board's Land Surveying Technical Advisory Committee ("TAC") also listed the need for rules explaining the experience required of

applicants for the second division examination. The TAC's agenda for Fiscal Year 1985-1986, lists the following as one of its goals:

> "Review existing laws and rules to propose necessary changes which will clarify the minimum qualifications for applicants to sit for the Land Surveyor exam. The Committee plans to develop written guidelines to be utilized by Board staff in reviewing applications. This will eliminate the need for the Committee to review all applications. The Committee's role in the 1986 application review process will be to review only those applications which do not fall within the guidelines." [Emphasis added.]

The TAC lists the following as one of its goals for Fiscal Year 1986-1987:

> "Review experience requirements for licensure. Define terms now used in the statutes such as 'responsible office training' and 'responsible field training' and suggest guidelines for evaluating applicant's experience." [Emphasis added.]

Apparently the TAC did not achieve this goal in fiscal year 1986-1987, because it repeated this "goal" in its list of "work plan items" for Fiscal Year 1987-1988.

While the record does not reflect whether the TAC developed its "guidelines" during any of these fiscal years, in March 1989, the TAC did develop a proposed regulation, section 425. The draft of section 425, entitled "Experience Requirements - Professional Land Surveyor," includes the following:

> "(f) For purposes of section 8742 of the Code, the term 'responsible field training experience' shall consist of experience in charge of and participating in the activities of a field survey crew at a level equivalent to a party chief with responsibility for planning, directing, and analyzing of field work involving one or more of the land surveying activities specified in subdivisions (a)-(g), (k) and (l) of section 8726 of the Code." [Emphasis added.]

According to the commenters in this proceeding and the information available to OAL, this proposed regulation has not, to date, been the subject of a notice of proposed rulemaking,[24] and has therefore not been adopted as a regulation under the APA.

On December 1, 1989, OAL published a summary of this Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.[25]

On January 16, 1990, the Board filed a Response to the Request with OAL. The Board summarized its position regarding the Request as follows:

> "An agency can be said to be exercising its quasi legislative powers when it adopts a policy which implements a statute administered by it. Under such circumstances, it is recognized that the exercise of this type of quasi legislative power is likely to be viewed as a regulation and thus subject to provisions of the APA. However, in the instant case, the Board has not adopted a policy which implements or makes specific section 8742 of the Business and Professions Code, but has instead summarized that statute and provided applicants with an example of what would qualify as responsible field training. Under such circumstances, the 'policy' is informational and nonregulatory in nature."

II. ISSUES

The three main issues before us are:[26]

(1) WHETHER THE APA IS APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.

(2) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."[27] Since the Board is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.[28]

Additionally, Business and Professions Code section 6716 provides in part:

> "The board may adopt rules and regulations consistent with law and necessary to govern its

> action. These rules and regulations shall be adopted in accordance with the provisions of the Administrative Procedure Act." [Emphasis added.]

We are aware of no statutory exemption which would permit the Board to conduct rulemaking without complying with the APA.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the challenged rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- implement, interpret, or make specific the law

enforced or administered by the agency or

- govern the agency's procedure?

The answer to the first part of the inquiry is "yes." For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[29] As previously discussed, the Board's letter denying the Requester's admission to the second division examination was specifically addressed to the Requester. However, the Board's policy of requiring applicants for the second division examination to demonstrate that they possess one year of "Party Chief" experience is not limited to the Requester. Rather, the Board's policy as announced in this letter applies to all applicants seeking admission to the second division examination.

As indicated above, in two successive letters, the Board denied the Requester admittance to the second division examination on the basis of his failure to demonstrate his experience as a "Party Chief." In the first letter, the Board stated that the Requester was ineligible for admission to this examination for the following reason:

> "Your references do not support your claim of having at least one year of satisfactory field training. Such field training must usually be at the level of Party Chief." [Emphasis added.]

In the second letter, the Board stated:

> "You did not sufficently [sic] verify your Party Chief time. At least 12 months of verifiable time is required." [Emphasis added.]

According to comments received in this proceeding, the Board found other applicants for admission to the second division examination ineligible for the same reason. The Board sent letters to these other applicants which were almost identical to the Board's first letter to the Requester. The letter to Don R. McDonald[30] stated:

> "Your references do not support your claim of having at least one year of satisfactory level responsible field training. Such field training must usually be at the level of Chief of Party." [Emphasis added.]

The letter to Kenneth E. Fritz[31] stated:

> "Your references do not support your claim of having at least one year of satisfactory level responsible field training. Such field training must usually be at the level of Party Chief." [Emphasis added.]

Mr. Fritz appealed the Board's decision, and in response, the Board sent Mr. Fritz a letter almost identical to the second letter sent to the Requester. The letter to Mr. Fritz[32] stated:

> "You did not furnish sufficient information to verify one year as Party Chief as defined in Professional Land Surveyors Act, section 8742."

Thus, it is apparent that the Board has applied the same policy to members of a class, i.e., that applicants for licensure as a Professional Land Surveyor must have one year of experience as "Party Chief" in order to sit for the second division examination.

The Board admits in its Response that similar statements have been sent to other applicants. The Board stated in its Response that:

> "Similar statements have been made to other applicants and it has been suggested that such conduct causes this 'rule' to be 'of general application' within the meaning of the APA. With the advent of word processing equipment, the era of personalized correspondence from an administrative agency is vanishing. In this instance, the statement in question has been used on separate occasions to different applicants, however, the purpose of the statement was to inform and assist the applicant to obtain his or her responsible field training. Under such circumstances, the statement in question is not a rule of general application."

Since the Board admits that it has repeated this "statement" or policy to other applicants, the Board has apparently denied the admittance of others to the examination for their failure to have one year of experience as a "Party Chief." Further, it is apparent that the Board is requiring applicants to obtain this specific experience in order to qualify for the second division examination from:

> (1) the Board's argument that ". . . the purpose of this statement was to inform and assist the applicant to obtain his or her responsible field training[,]" and

(2) the Board's statement in its letters of denial that "you did not furnish sufficient information to verify one year as Party Chief. . . ."

The Board, however, believes that this policy is not one of general application, but one that is used on a case-by-case basis. In its Response to this Request, the Board stated that,

> "The written statement in question is utilized by the Board on a case by case basis in response to the experience contained in a particular application. That is, the application must evidence that the qualifying experience is deficient and that it does not demonstrate sufficient accountability or assumption of responsibility on the part of the applicant in relation to the land surveying tasks which are described int he [sic] application. The statement in question would not be used where the application is deficient because, for example, the applicant has submitted field experience which does not relate to land surveying activities or experience which was not done under the immediate and responsible direction of a land surveyor. Accordingly, it cannot be said to be a rule of general application.
>
> "Thus, the written statement in question is utilized by the board on a case by case basis in the exercise of its powers to review the qualification s of applicants." [Emphasis added.]

Restated, the Board is arguing that this policy is not one of general application since it is not used in those situations where the application is deficient for some reason other than the absence of Party Chief experience. However, the Board has in this statement actually agreed that this is a policy that is generally applied to all applicants. It is used as a standard in reviewing applications when the applicant has not demonstrated ". . . sufficient accountability or assumption of responsibility . . . in relation to the land surveying tasks . . . ." Thus, it appears that the language in the Requester's denial letter is used with other applicants in all cases where they have not provided the Board with evidence of one year of Party Chief experience. The fact that this is not the sole reason for denying an applicant does not negate the fact that this is a policy of general application.

Having established that the policy is one of general application, we now inquire whether the challenged rule has been adopted by the Board to implement, interpret, or make specific the law enforced or administered by the Board, or

to govern the agency's procedure. The answer to this part of the inquiry is also "yes."

The Board's policy implements, interprets, or makes specific Business and Professions Code section 8742. As indicated above, section 8742 requires applicants for the second division examination to possess certain minimum educational qualifications and experience in land surveying. The applicant can satisfy these qualifications in three ways, one of which is

> "Actual experience in land surveying for at least six years, including one year of responsible field training and one year of responsible office training;" [Emphasis added.][33]

As indicated above, the Board stated in its letter to Mr. Fritz that he ". . . did not furnish sufficient information to verify one year as Party Chief as defined in Professional Land Surveyors Act, section 8742. (Emphasis added.)" Section 8742, however, only requires one year of responsible field training, and does not define "responsible field training," nor "Party Chief." Further, the Board in its Response to the Request for Determination, admits that "existing statutes and regulations do not specifically require an applicant to possess party chief experience."

In its Response, the Board argues that this policy restates exiting law and does not implement a statute administered by the Board. It is the Board's position that the phrase "responsible field training" is ". . . adequate in and of itself with respect to its meaning." The Board argues that since the word "responsible" is defined in the Funk & Wagnalls Standard College Dictionary as meaning, "involving accountability or obligation," the phrase "responsible field training" would mean an applicant's qualifying field experience must be obtained by "performing land surveying activities in an accountable or responsible manner."

If the Board interpreted "responsible field training," as defined above, in determining whether an applicant has the requisite qualifying experience, it is possible that the Board would not be interpreting or implementing Business and Professions Code section 8742. However, it is evident from the letters to applicants Canuti and Fritz that the Board is interpreting "responsible field training" to mean "Party Chief" experience.

Further, if the phrase "responsible field training" is ". . . adequate in and of itself with respect to its meaning" as the Board argues, then why would the Board consider adopting a regulation to define this phrase? As indicated above, the TAC has proposed regulation section 425, subsection (f) which defines the phrase "responsible

field training." In addition, the TAC has listed as one of its "goals" for fiscal years 1986-1987 and 1987-1988 the definition of the phrase "responsible field training."

The Board also argues in its Response that "the term 'party chief' is a generic term used in the land surveying profession to identify an individual who is in charge or who directs the movement of the surveying party." It is interesting to note that the Board in its Response refers to this term using lower-case letters, i.e., "party chief." Yet, in each letter the Board sent to applicants Canuti, Fritz, and McDonald, and on the form the Board sends to those person providing personal references for applicants,[34] the term is capitalized, i.e., "Party Chief" or "Chief of Party." The capitalization of this term is some indication that the Board is requiring experience gained under that specific title, rather than using the term as an indication of the type of experience the Board requires of applicants to satisfy the "responsible field training" requirement.

In addition, although the Board argues that the term "party chief" is a "generic term used in the land surveying profession," this position is hotly disputed by the commenters. According to the commenters, the term "Party Chief" is a job title which requires specific experience or licensure. To be employed as a "Party Chief" with the State of California, the individual must be a licensed land surveyor.[35] The title "Party Chief" is also a job classification within a labor union and requires union experience.[36] Some employers may also require the "Party Chief" to act in "responsible charge," and therefore, must be a licensed land surveyor pursuant to Business and Professions Code section 8726 and section 404.2 of Title 16 of the CCR.[37]

The Board also argues that since experience gained as a "Party Chief" would satisfy the "responsible field training" requirement of Business and Professions Code section 8742,

> "when the Board advises an applicant that field training must usually be at the party chief level, it is merely giving an illustration of the plain language meaning of the provisions of Section 8742." [Emphasis added.]

The Board further argues that

> "As a restatement of existing law, the written statement concerning experience at the party chief level is informational in nature. It does not attempt to interpret or make specific a statute administered by the board, but instead explains the statute and regulations according to their plain meaning by using examples which are recognized in the profession.

". . . .

"In addition, the letter in question does not require the applicant to possess specific party chief experience, but rather advises the applicant as to the type of experience which has been historically submitted by other applicants to meet the responsible field training requirement." [Emphasis added.]

In the initial letters the Board sent to applicants Canuti, Fritz, and McDonald, as indicated above, the Board did use the phrase "such field training must usually be at the level of Party Chief [or Chief of Party]." (Emphasis added.) The phrasing of these letters could lead an applicant to believe that experience gained at a level similar to "Party Chief" would be sufficient to qualify him/her for the second division examination. However, when applicants Canuti and Fritz appealed the Board's letter of denial, the Board responded by unequivocally stating, respectively, that:

"You did not sufficently [sic] verify your Party Chief time. At least 12 months of verifiable time is required." [Emphasis added.]

and,

"You did not furnish sufficient information to verify one year as Party Chief as defined in Professional Land Surveyors Act, section 8742." [Emphasis added.]

Thus, the Board's specific requirement that applicants have one year of experience using the title "Party Chief," can not be considered an "illustration of the plain language meaning of the provisions of Section 8742." Nor can it be deemed a "restatement of existing law" since the statute does not require an applicant to possess "Party Chief" experience. And since the Board is specifically requiring "Party Chief" experience, this requirement can not be considered to provide applicants with an example of the type of experience "historically" submitted by other applicants to meet the responsible field training requirement.

By requiring applicants to have one year of "Party Chief" experience, the Board is evidently interpreting section 8742 in such a way as to equate one year of "responsible field training" with one year of "Party Chief" experience.

The Board currently has a regulation which interprets and implements section 8742. Subsection (d) of section 424 of Title 16 of the CCR, requires that the experience gained under section 8742 be under the immediate direction and

supervision of a person qualified to practice land surveying. Thus, the Board's current regulations do not equate "responsible field training" with "Party Chief" experience.

WE CONCLUDE THAT the Board's policy of requiring applicants for the second division examination to have one year of "Party Chief" experience is a "regulation" as defined in Government Code section 11342, subdivision (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless they have been expressly exempted by statute. Additionally, rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.[38]

The Board, in its Response, argues that the policy in question falls within an exception to the APA contained in Government Code section 11343, subdivision (a)(3). That section provides:

> "Every agency shall:
>
> "(a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one which:
>
> ". . . .
>
> "(3) Is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.
>
> ". . . ." [Emphasis added.]

As indicated above in our discussion of issue number two, the Board's policy does not apply solely to a specifically named person or group of persons, but to all individuals throughout the state who apply for licensure as a Professional Land Surveyor. Therefore, the Board's policy does not fall within this exception, nor any other exception to the APA.

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) rules issued by the Board are specifically required by the Business and Professions Code to be adopted pursuant to the Administrative Procedure Act;

(2) the Board's policy requiring one year of "Party Chief" experience prior to applicants qualifying for the second division land surveyor examination is a "regulation" as defined in Government Code section 11342, subdivision (b);

(3) the policy is not exempt from the requirements of the APA; and, therefore,

(4) the policy violates Government Code section 11347.5, subdivision (a).

DATE: February 14, 1990

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1. This Request for Determination was filed by Larry J. Canuti, 4041 Lorraine Dr., San Bernardino, CA 92407, home phone: 714-881-2802; work phone: 714-383-4144. The Board of Registration for Professional Engineers and Land Surveyors was represented by Jeff Marschner, Deputy Director Legal Affairs, and Donald Chang, Staff Counsel, Department of Consumer Affairs, 1020 N Street, Sacramento, CA 95814, (916) 445-4216.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination as filed with the Secretary of State and as distributed in typewritten format is "94" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

Since August 1989, the following authorities have come to light:

> (1) Los Angeles v. Los Olivas Mobile Home P. (1989) __ Cal.App.3d __, 262 Cal.Rptr. 446, 449, citing Jones v. Tracy School District (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved; the Second District Court of Appeal refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing).

(2) Compare Developmental Disabilities Program, 64 Ops.Cal.Atty.Gen. 910 (1981) (Pre-11347.5 opinion found that Department of Developmental Services' "guidelines" to regional centers concerning the expenditure of their funds need not be adopted pursuant to the APA if viewed as nonmandatory administrative "suggestions"); with Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 211 Cal.Rptr. 758 (court avoided the issue of whether DDS spending directives were underground regulations, deciding instead that the directives were not authorized by the Lanterman Act, were inconsistent with the Act, and were therefore void).

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

> "'Determination' means a finding by [OAL] as to whether a state agency rule is a [']regulation,[']
> as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable
> unless it has been adopted as a regulation and
> filed with the Secretary of State in accordance
> with the [APA] or unless it has been exempted by
> statute from the requirements of the [APA]."
> [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. Government Code section 11347.5 provides:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or

other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation[']as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

5. Reflecting OAL's special expertise in deciding whether or not particular agency rules are subject to California APA requirements, regulatory determinations issued pursuant to Government Code section 11347.5 are--for five reasons--entitled to great weight in judicial proceedings.

First, Government Code section 11347.5, subdivision (e), provides that OAL determinations shall not be considered by a court if a combination of three specified conditions is present. Clearly, the Legislature envisioned that determinations would be considered by the court in all other circumstances. Though the statute does not specify the weight that should be given the determination, it is apparent that the Legislature envisioned and intended that courts would give determinations appropriate consideration.

Noteworthy by its absence from Government Code section 11347.5 is any provision for enforcement of the determination by OAL; clearly, it was intended that a citizen unable to obtain voluntary agency compliance with an OAL determination would need to seek judicial relief. A review of pertinent legislative history documents indicates that the basic idea behind the statute was that the OAL determination process would encourage voluntary APA compliance by focusing intense publicity on the rulemaking agency. Thus, while there is no support in the statute for the proposition that determinations are legally binding, it is difficult to argue that the Legislature intended that OAL determinations be given anything less than the "great weight" traditionally accorded the interpretation of a statute by the agency charged with its enforcement. See Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94. Clearly, OAL is the

agency charged with the enforcement of Government Code section 11347.5.

Second, the Legislature's special concern that OAL determinations be given appropriate weight in the judicial context is evidenced by the directive contained in Government Code section 11347.5, subdivision (c)(4): that OAL shall "[m]ake its determination available to . . . the courts." [Emphasis added.]

Third, an official legislative analysis of the implementation of Government Code section 11347.5 explicitly states that OAL is the state agency with "statewide expertise" in regulatory matters and is the appropriate agency to administer Government Code section 11347.5 because the administering agency must "enforce regulatory discipline on state departments." [Emphasis added.] [The quoted language is from the "Analysis of the Budget Bill: For the Fiscal Year July 1, 1985 to June 30, 1986," prepared by the Legislative Analyst for the Joint Legislative Budget Committee, dated February 27, 1985, p. 1607.] Responding to a request from the Legislature that the option of transferring responsibility for implementation of Government Code section 11347.5 from OAL to the Department of Justice (DOJ) be evaluated, the Legislative Analyst recommended that OAL continue to administer the program. The passage from the analysis in which the language quoted above appeared reads as follows:

> "Our review indicates that transfer of the AB 1013 program is not warranted on programmatic grounds, for two reasons. First, we believe this program is best managed by a control agency [other "control agencies" are the Department of Finance and the Department of General Services, which provide central oversight of state agencies in the areas of budget and contracts, respectively] having both oversight and managerial experience. Our analysis indicates that these attributes are appropriate because the implementation of the AB 1013 [Government Code section 11347.5] program requires the administering agency in effect to enforce regulatory discipline on state departments. The OAL currently performs control agency functions; the DOJ--which is basically a client- or service-oriented agency--generally does not.
>
> "Second, transfer of the program would result in an unnecessary duplication of state resources. Currently, statewide expertise in the drafting, review, and screening of regulations rests with OAL. If the AB 1013 program were transferred to the DOJ, departments would have to deal with two

> separate state agencies on the same set of regulations. Under such a bifurcated system, there would have to be some duplication of expertise among the agencies. There would also be the potential for disagreement between the two agencies as to how informal regulations should be interpreted." [Emphasis added.]

Fourth, OAL issued the first regulatory determination in April 1986 (after the quoted Legislative Analyst report was issued) and has as of January 31, 1990, issued 68 formal determinations. Thus, in the nearly four years since the legislative report was submitted, OAL has substantially increased its familiarity with the legal issue of whether or not an uncodified agency rule is an underground regulation.

Fifth, since April 1986, the Regulatory Determination Program has attained a high degree of acceptance in the legal community. This acceptance is demonstrated by the identity of some of the persons who (1) have submitted requests for determination or (2) have commented on pending requests. [This category does not include agencies simply responding to charges that rules issued by them were illegal.]

Focusing on the public sector, these persons include State Senator Nicholas Petris, Assemblyman Gil Ferguson, Lieutenant Governor Leo McCarthy, Assemblyman Byron Sher, State Senator William Craven, the Department of Personnel Administration, the Department of Consumer Affairs, CalTrans, the Resources Agency, the San Francisco Bay Conservation and Development Commission, the City of Hollister, the City of Walnut Creek, and the United States Department of the Interior. Especially noteworthy public sector participants are two state agencies, the State Building Standards Commission and the State Historical Building Code Board, which filed requests attacking alleged underground regulations issued by other state agencies.

Focusing on the private sector, entities actively participating in the Regulatory Determinations Program include the Pacific Gas and Electric Company, the Dow Chemical Company, the Sierra Club, the Environmental Defense Fund, the California Chamber of Commerce, the California Taxpayers Association, the California Restaurant Association, the Legal Aid Societies of Marin and San Mateo County, Chevron USA Inc., Protection and Advocacy, Inc., the Pacific Legal Foundation, several labor unions, and numerous private citizens.

6. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

Public comments were timely submitted by the following individuals in support of the Request for Determination:

Kenneth E. Fritz, 1512 Leimert Blvd., Oakland, CA 94602 (letter dated April 26, 1989)

Paul R. Ladyman, PLS, 3109 Explorer Drive, Sacramento, CA 95827 (letter dated December 18, 1989)

Lawrence R. Fenske, Chief of the Geometronics Branch, Engineering Services Office, Division of Project Development, Department of Transportation (memorandum dated December 19, 1989)

Stephen D. Beck, Staff Consultant with the Professional Engineers in California Government (letter dated December 21, 1989)

Stephen C. Wilson, Chairman of the Northern California Section of the American Congress on Surveying and Mapping (letter dated December 21, 1989)

David A. Goodman, L.S., R.C.E., 4810 Zube Court, Carmichael, CA 95608 (letter dated December 29, 1989)

R. E. Longstreet, Chief, Engineering Services, Dist. 8, Department of Transportation (memorandum dated December 22, 1989)

James Corn, Law Offices of Turner and Sullivan, 1000 G Street, Suite 300, Sacramento, CA 95814, on behalf of California Council of Civil Engineers and Land Surveyors (letter dated December 29, 1989)

Robert L. Nelson, Headquarters Surveys Engineer, Engineering Services Office, Division of Project Development, Department of Transportation (memorandum dated January 2, 1990)

Robert G. Hoerger, Attorney at Law, L.S., P.O. Box 3703, Stanford, CA (letter dated January 2, 1990)

John Canas, Surveyor, Environmental Management Agency, County of Orange, P.O. Box 4048, Santa Ana, CA 92702-4048 (letter dated December 26, 1989)

James K. Crossfield, Ph.D., California State University, Fresno, Department of Civil Engineering and Surveying Engineering, Fresno, CA 93740-0094 (letter dated December 22, 1989)

Paul A. Cuomo, L.S., 538 Aliso Ave., Newport Beach, CA 92663 (letter dated December 18, 1989)

Fred W. Henstridge, L.S., Psomas and Associates, 3187 Red Hill Avenue, Suite 250, Costa Mesa, CA 92626 (letter dated December 21, 1989)

All of the above-noted correspondence, which met all of the submission requirements, was considered in rendering this determination.

The Board's Response to the Request for Determination was received by OAL on January 16, 1990, and was considered in rendering this determination.

7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for $3.00.

10. Business and Professions Code section 6710.

11. Stats. of 1929, ch. 801, p. 1645, sec. 2.

12. Stats. of 1983, c. 150, sec. 4., (Business and Professions Code section 6710.)

13. Business and Professions Code sections 6700 through 6799.

14. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

    The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

    The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

    Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

    If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15. Business and Professions Code section 8700 through 8806.

16. Business and Professions Code section 8741.1 also requires the second division of the examination to test the applicant's knowledge of state laws and the board's rules and regulations.

17. Business and Professions Code section 8742, subdivision (a)(2).

18. "Chief of Party" was defined in Title 16, CCR, section 424, which has since been amended, deleting the definition language. Section 424 stated "For purposes of this rule, Chief of Party is defined as the subordinate of a licensed land surveyor or registered civil engineer who is responsible for direction and supervision of one or more survey crews actively engaged in the field applying the principles and techniques of land surveying." See also notes 21 and 22, below.

19. Letter dated March 14, 1989, attached as "Attachment C-2.1" to the formal Request for Determination dated May 10, 1989.

20. Letter dated April 11, 1989, attached as "Attachment C-5" to the formal Request for Determination dated May 10, 1989.

21. California Administrative Code, Register 63, No. 13 (8-17-63). Please note that on January 1, 1988, the "California Administrative Code" was renamed the "California Code of Regulations."

22. California Administrative Code, Register 73, No. 30 (7-28-73). Please note that on January 1, 1988, the "California Administrative Code" was renamed the "California Code of Regulations."

23. Government Code section 11017.6 requires every rulemaking agency to annually prepare a rulemaking calendar for filing with OAL, who then publishes the information in the California Regulatory Notice Register. This section provides in part:

> "Every state agency responsible for implementing a statute which requires interpretation pursuant to the [APA] shall prepare, by January 30 of each year, a rulemaking calendar for that year . . . .
>
> "The rulemaking calendar shall consist of two schedules as follows:
>
> "(a) A schedule which describes the rulemaking necessary to implement statutes enacted during the previous year. The schedule shall include the projected dates on which the agency plans to:

(1) Publish the notice of proposed action for each rulemaking.

(2) Schedule a public hearing if one is required or requested.

(3) Adopt the regulations.

(4) Submit the regulations to the office for review . . . .

"(b) A schedule which describes all other rulemaking the agency plans to propose, to implement or interpret other statutes enacted during the years prior to the previous year . . . ."

24. Pursuant to Government Code section 11346.4.

25. California Regulatory Notice Register 89, No. 48-Z, p. 3278.

26. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

27. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

28. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

29. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

30. Letter of October 27, 1987, attached as Appendix L to comment of Robert G. Hoerger.

31. Letter of March 14, 1989, attached as Appendix M to comment of Robert G. Hoerger.

32. Letter of April 11, attached as Attachment C-7 to the Request and as Appendix N to comment of Robert G. Hoerger.

33. Business and Professions Code section 8742, subdivision (a)(2).

34. Appendix O to comment of Robert G. Hoerger. In section 2 (e) of the form the Board inquires "Has applicant functioned as a Chief of Party?" and "Approximately how much time in this position?"

35. See comments of Paul Ladyman and Lawrence Fenske

36. See comment of James P. Corn.

37. See comments of Robert Nelson and Fred Henstridge.

38. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

    c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

We wish to acknowledge the substantial contribution of Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.

DECLARATION 1990 FEB -5 P 11:49

I, JAMES K. CROSSFIELD OFFICE OF ADMINISTRATIVE LAW, declare under penalty of perjury under the laws of the State of California that I believe all written information contained in this public comment and all other written information submitted with this public comment is true and correct and that this declaration was executed this 31ST day of JANUARY, 1990, at FRESNO, California.

Signature James K. Crossfield

Printed Name JAMES K. CROSSFIELD

# # #

TRANSMITTAL DECLARATION

I, JAMES K. CROSSFIELD, declare under penalty of perjury under the laws of the State of California that the documents contained herein were first transmitted by the United States mail on OR ABOUT DEC. 20, 1989, to the head of the state agency whose rule is the subject of this Request for Determination at the following address:

Name/Title Darlene Stroup
Executive Officer

Agency Board of Registration for Professional Engineers

Address 1428 Howe Avenue, Suite 56

City/State Sacramento, CA 95825-3298

and that this declaration was executed on this 31ST day of JANUARY, 1990, at FRESNO, California.

Signature James K. Crossfield

Printed Name JAMES K. CROSSFIELD

[Commenter dec]

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